APPENDIX

Memorandum Decision of the United States District Court for the Western District of Tennessee

(filed July 30, 1965)

[Caption Omitted]

Plaintiffs have filed motions for additional relief, which raise these issues:

1. Whether the assignment and transfer plan and policies as actually carried out by the defendants violate plaintiffs' constitutional rights, and if so, to what extent must the plan or policies be amended;

2. Whether the amended unitary zones for elementary schools and the proposed unitary zones for junior high schools are gerrymandered to maximize segregation and thereby violate plaintiffs' constitutional rights;

3. Whether the plan for gradual desegregation heretofore approved by the court, viewed as of now, meets the constitutional standard of "all deliberate speed";

4. Whether plaintiffs are entitled, under the Constitution, to an order requiring the desegregation of faculty, administrative and supporting personnel, and faculty in-service training programs;

5. Whether plaintiffs are entitled, under the Constitution, to an order prohibiting segregation in curricular and extra-curricular activities;

6. Whether plaintiffs are entitled to recover attorneys fees incurred in connection with these motions.

We will dispose of these issues in the order in which they are set out above.

Memorandum Decision

At the outset it should be noted, as we have indicated, that plaintiffs are asserting Fourteenth Amendment rights alone, and are asserting no rights under any Act of Congress.

In dealing with the multifarious issues that may be presented in school desegregation cases, there frequently is difficulty in deciding a particular issue even if the applicable principle of law has been fairly well crystalized. This is especially true in this field because, even though so crystalized, an applicable principle is of necessity a general principle which must be applied to myriad factual situations. More difficulty is encountered, however, when an underlying general principle has not yet become clear. An example of this is the lack of complete clarity as to whether the Constitution requires only an abolition of compulsory segregation based on race or requires something more. This general question must first be answered before we can deal with the assignment and transfer issue and the gerrymandering issue.

This court has heretofore considered the question as to whether the Constitution requires only an abolition of compulsory segregation based on race. *Vick, et al.* v. *Board of Education of Obion County, Tennessee,* 205 F. Supp. 436 (W.D. Tenn. 1962); *Monroe, et al.* v. *City of Jackson, Tennessee,* 221 F.Supp. 963 (W.D. Tenn. 1963); and *Monroe, et al.* v. *Madison County, Tennessee,* 229 F. Supp. 580, (W.D. Tenn. 1964). The latter two opinions were rendered at earlier stages of the separate proceedings in this action. We concluded in these opinions that abolition of segregatio nbased on race is all that the Constitution requires. We based this conclusion not only on our interpretation of the second *Brown opinion* (349 U.S. 294 (1954)) and *Cooper* v. *Aaron,* 358 U.S. 1 (1958), but also on the now famous specific statement to that effect

in *Briggs* v. *Elliott,* 132 F.Supp. 776 (E.D. S.C. 1955), which was a *per curiam* opinion by three-judge court presided over by Judge Parker of the Court of Appeals for the Fourth Circuit. However, plaintiffs again earnestly contend that the Constitution requires an integrated education, and so we have taken this occasion again to review the law.

We find that the following opinions, among others, cite and approve the statement in *Briggs* v. *Elliott, supra,* to the effect that the Constitution requires only an abolition of compulsory segregation based on race: *Kelley* v. *Boar dof Education of Nashville,* 270 F.2d 209, 226 (6th Cir. 1959); *Bell et al.* v. *School City of Cary,* 324 F.2d 209, 213 (7th Cir. 1963); *Griffin* v. *Board of Supervisors of Prince Edward County,* 322 F.2d 332, 336 (4th Cir. 1963); *Dillard* v. *School Board of City of Charlottesville,* 308 F.2d 920, dissent at p. 926, (4th Cir. 1962); *Boson* v. *Rippy,* 285 F.2d 43, 48 (5th Cir. 1960); *Avery* v. *Wichita Falls Independent School Dist.,* 261 F.2d 230, 233 (5th Cir. 1957); *Armstrong* v. *Board of Education of Birmingham,* 323 F.2d 333, dissent at p. 346 (5th Cir. 1963); *Taylor* v. *Board of Education of New Rochelle,* 294 F.2d 36, dissent at p. 47 (2nd Cir. 1961). It is interesting to note that the Fifth Circuit in a very recent case (*Singleton* v. *Jackson Municipal Separate School Dist.,* —— F.2d ——, decided June 22, 1965), recognizing that it had more than once approved the statement in *Briggs,* said that it now "should be laid to rest" and that ". . . the second *Brown* opinion clearly imposes on public school authorities the duty to provide an integrated school system." There is other authority in support of the view now taken by the Fifth Circuit, but the clear weight of authority in the Courts of Appeal and District Courts sup-

ports the view taken in *Briggs* and, as stated, our Court of Appeals in the *Kelley* case, *supra*, seems to subscribe to the *Briggs* view.

This question as to what the Constitution requires comes into sharper focus in two different contexts: one is a situation in which "honestly" arrived at unitary zones result in *de facto* school segregation because of existing racial housing patterns; the other is a situation in which a voluntary assignment and transfer provision, not based on race, results in the continuance of segregation. In *Northcross et al.* v. *Board of Education of Memphis,* 333 F.2d 661 (6th Cir. 1964) our Court of Appeals recognized that there is no constitutional obligation to draw zone lines to maximize integration. See also, to the same effect, *Downs et al.* v. *Board of Education of Kansas City,* 336 F.2d 988 (10th Cir. 1964), cert. denied 380 U.S. 914 (1965). The Supreme Court has not dealt specifically with the first situation, but it has done so with the second. In *Goss, et al.* v. *Board of Education of City of Knoxville,* 373 U.S. 683 (1963), the Supreme Court struck down transfer provisions which allowed pupils who, under the rezoning, would be required to attend a school in which they would be in a racial minority to transfer to a school in which they would be in a racial majority. In so doing, the Court said at pp. 686-687:

> "It is readily apparent that the transfer system proposed lends itself to tperpetuation of segregation. Indeed, the provisions can work only toward that end. While transfers are available to those who choose to attend school where their race is in the majority, there is no provision whereby a student might transfer upon request to a school in which his race is in a

minority, unless he qualifies for a 'good cause' transfer. As the Superintendent of Davidson County's schools agreed, the effect of the racial transfer plan was 'to erpmit a child [or his parents] to choose segregation outside of his zone but not to choose segregation outside of his zone.' Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination, i.e., the majority race of the transferee and continued segregation. This Court has decided that state-imposed separation in public schools is inherently unequal and results in discrimination in violation of the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 98 L.ed 873, 74 S. Ct. 686, 38 ALR 2d 1180 (1954). Our task then is to decide whether there transfer provisions are likewise unconstitutional. In doing so, we note that if the transfe rprovision were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another.

"Classification based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment."

And the Court further said at pp. 688-689:

"The alleged equality—which we view as only superficial—of enabling each race to transfer from a de-

segregated to a segregated school does not save the plans. Liwe arguments were made without success in Brown, 347 U.S. 483, 98 L.ed. 873, 74 S.Ct. 686, 38 ALR 2d 1180, supra, in support of the separate but equal educational program. Not only is race the factor upon which the transfer plans operate, but also the plans lack a provision whereby a student might with equal facility transfer from a segregated to a desegregated school. The obvious one-way operation of these two factors in combination underscores the purely racial character and purpose of the transfer provisions. We hold that the transfer plans promote discrimination and are therefore invalid.

"This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. But no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."

It appears that the Court held that these transfer provisions could not stand for two separate reasons: first, on their face they contained an invalid racial classification, and second, they could operate only to perpetuate segregation. However, the Court expressly recognized that a transfer provision or policy which did not contain a racial classification and which allowed transfers as readily to a school in which the applicant would be in a racial minority as it allowed transfers to a school in which the

applicant would be in a racial majority would be valid. The Court therefore did not hold that integration is a required end result of the provision or policy. And, as we said in our earlier opinion in this very action (221 F. Supp. 968, 974), it is difficult to see how it could be held that segregation resulting from purely voluntary choice could violate the Fourteenth Amendment as it would not be "state-imposed separation." Similarly, it is difficult to see, for the same reason, ho wit could be held that segregation that resulted from "honestly" arrived at geographical zoning could violate the Fourteenth Amendment. We therefore conclude, as we concluded before, that the Constitution does not require integration and that it only requires the abolition of compulsory segregation based on race.

We come now to consider the contention of plaintiffs that the assignment and transfer plan or policy as actually carried out by defendants deprives plaintiffs of their constitutional rights, and if so, to what extent must the plan or policies be amended. In the plan heretofore approved by this Court in the summer of 1963, pupils already attending school in the system during the 1962-63 school year were to be allowed to continue in the school they were attending until graduation irrespective of whether they lived in the new unitary zone of that school, provided that all pupils who lived in the unitary zone of the school and who were entitled for that reason to attend the school would have a preferential right to attend. We approved this provision for reasons set out in our opinion (221 F. Supp. 968, 972), pointing out that the provisions would expire by its own terms in a relatively few years. With respect to assignments and transfers generally, we merely held (221 F. Supp. 965, 971) that defendants could adopt any plan o rpolic ywith respect to desegregated grades,

provided that no assignment or transfer could be based on race or have as its purpose the delay of desegregation as contemplated by the plan.

It appears that defendants, in two particulars, have gone beyond what they were allowed to do with respect to assignments and transfers:

1. They have allowed pupils as a matter of course to be assigned or to be transferred out of their unitary zones to a school in which they would be in a racial majority and have not allowed pupils as a matter of course to be assigned or to be transferred out of their unitary zones to a school in which they would be in a racial minority. More specifically, they have allowed white pupils as a matter of course to attend schools, outside of their unitary zones, in which white pupils predominate, and have allowed Negro pupils as a matter of course to attend schools, outside of their unitary zones, attended only by Negroes, but they have denied Negroes (and specifically intervening plaintiffs) the right to attend predominantly white schools outside of their unitary zones. This plan or policy clearly deprives plaintiffs of their constitutional rights, as was held by the Supreme Court in the *Goss* case, *supra*, and is clearly contrary to our prior holding.

2. They have treated pupils, after they were allowed in 1963-64 and 1964-65 to attend schools outside of their unitary zones, as if they were thereafter covered by the approved provision allowing only pupils attending in the system in 1962-63 to continue until graduation in the school in which they were then enrolled. This approved provision, by its own terms, applied only to pupils attending in the system in 1962-63.

If defendants intend to continue this policy of allowing white and Negro pupils to attend schools outside of their unitary zones where they will be in a racial majority, they must, beginning with the 1965-66 school year, also allow white and Negro pupils to the same extent and under the same terms to attend schools outside of their unitary zones where they will be in a racial minority. This is required by the *Goss* case, *supra,* and by the decree heretofore entered. Moreover, those Negro pupils who have heretofore applied for and been denied the right to attend predominantly white schools outside their unitary zones must be admitted to such schools, at least in the school year 1965-66, if they so desire. This is necessary to vindicate the Constitutional rights which have been denied them, whether or not the defendants choose to follow the policy herein approved, of allowing pupils to attend schools outside their unitary zones irrespective of whether they will be in a racial majority or minority.

It appears that, in carrying out their policy of allowing white and Negro pupils to attend schools outside their unitary zones in which they would be in a racial majority, defendants have not required these pupils to register in the schools of their unitary zones and then to apply for a transfer. Rather, they have allowed these pupils to register directly in the schools outside of their zones. Plaintiffs contend that, if defendants choose to go forward with the amended policy and plan which the Court is here approving, each pupil should be required each year to register in the school of his unitary zone and apply for a transfer; this is necessary, argue plaintiffs, to make the choice more realistic. More specifically, it is argued that, given the long history of segregation, white and Negro pupils would be much less likely to choose to attend the school of the

unitary zone in which they live, if they would be in racial minority in that school, if they are allowed to register directly in a school in another zone in which they would be in a majority. While we believe, as we have held, that a system of voluntary choice is constitutional, we also believe that every safeguard should be had in insure that choices will be conscious and considered choices and that such a choice will more likely be made if pupils are required each year initially to register in the school of the zone in which they live. Accordingly, we conclude that this must be required by defendants.

With respect to the other particular in which defendants have gone beyond what they were allowed to do, pupils who were not in the school system in 1962-63 shall not have the right, as do pupils who were attending during that year, to continue until graduation in a school outside their unitary zone.

The next issue presented is whether the amended unitary zones for elementary schools and the proposed unitary zones for punior high schools are gerrymandered so as to maximize segregation. Before dealing with this issue, we should note that plaintiffs first contend that even if the zones are not gerrymandered, they will create a large measure of *de facto* segregation, and therefore they must be redrawn to bring about more integration. However, we dealt with this contention in our earlier opinion in this case (221 F.Supp. 968, 973), and we have heretofore dealt with it again in this opinion. We have reached the conclusion that "honestly" drawn zone lines, which result in *de facto* segregation, do not deprive plaintiff of any constitutional rights.

In approaching the gerrymandering issue, we must first ascertain from the adjudicated cases what constitutes

gerrymandering in school zoning. The *Northcross* case, *supra,* and the *Downs* case, *supra,* hold that a school board may, in its discretion, use any rational basis for drawing zone lines but that it, of course, cannot consider race as a factor. *Northcross* specifically holds that the motive of minimizing the disturbance of the people and the motive of preserving school loyalties are not proper considerations in zoning. *Northcross* recognized that such considerations as utilization of the buildings, proximity of the pupils to the schools, and natural boundaries are proper considerations. *Northcross* also holds that, when challenged, the burden of proof is on the school board to show that boundaries were not drawn with a view to preserve the maximum amount of segregation.

In an earlier stage of these proceedings the Court approved elementary school zones as submitted by defendants but, on these motions for further relief, allowed plaintiffs to reopen the question as to whether these zones are gerrymandered. Defendants have redrawn the boundary between West Jackson and South Jackson elementary schools and, as so amended, have submitted these elementary school zones for approval. Defendants have, pursuant to an order of the Court heretofore entered, established unitary zones for the three junior high schools and, by consent of all parties, the hearing with respect to these zones was held concurrently with the hearing on plaintiffs' motions for further relief. It is the contention of plaintiffs that both the elementary school zones and the junior high school zones are gerrymandered and that the Court should appoint a master to redraw the zone boundaries or require the defendants to redraw them and resubmit them for approval.

Memorandum Decision

Defendants have prepared and introduced into evidence maps reflecting the location of the schools, the zone boundaries, and the location of the homes of white (in blue) and Negro (in red) children of school and pre-school age. Defendants also offered in evidence exhibits showing the capacity of the schools, the number of pupils that have been attending each, and the average size of classes. The superintendent testified that the zones were drawn without regard to race and are the result of a consideration of utilization of buildings, proximity of pupils to the schools and natural boundaries.

In addition to contending that defendants' proof shows on its face that the zones are gerrymandered, plaintiffs offered two expert witnesses, who had also prepared maps, and who contended that the zones are gerrymandered. However, the value of the testimony of these experts was undercut by the fact that they assumed that it is the duty of defendants to maximize integration because of educational benefits that would, in their opinion, flow therefrom. The value o ftheir testimony with respect to elementary schools was further somewhat undercut because their maps were aimed to show the amount of *de facto* segregation that has resulted after two years u[illegible] the plan. However, in view of voluntary transfers by white and Negro pupils, the degree of actual segregation in these schools does not itself show that the zones are gerrymandered. The value of the testimony of these experts with respect to junior high schools was somewhat undercut because they not only again assumed a duty to maximize integration but also assumed that defendants had the duty to adopt a "feeder" system whereby certain elementary schools would send their graduates only to a particular junior high. These experts admitted that in many instances the question as to where a

boundary should be drawn is one of judgment as to which honest experts could disagree.

We believe that, under the *Northcross* case, *supra*, the question whether the zones are gerrymandered should be determined primarily by consideration of the utilization of buildings, proximity of pupils to the schools, and natural boundaries.

It would be useless to set out in this opinion the relevant facts with respect to utilization, proximity and natural boundaries as to each elementary school zone. (It should be noted here that, as to utilization, the best information we have is the capacity and enrollment of each school during the past school year, which, in view of voluntary transfers, may not be an accurate projection as to the coming year and future years.) Rather, we will discuss only those boundaries as to which there apepars to be gerrymandering.

The most recent figures show that South Jackson is over enrolled and that West Jackson is under capacity. The boundary between these unitary zones as approved by the Court places Negro pupils who live much closer to West Jackson (which has been a predominantly white school but has had 14 Negro pupils) in the zone of South Jackson (which has been an all Negro school). Defendants, at the hearing, proposed to redraw that line so as to partially correct this situation but their proposal does not completely correct it. We conclude that the south line of the West Jackson zone should extend eastwardly from Poplar along Main to Royal.

The most recent figures show that both Parkview (which has been a predominantly white school with only one Negro pupil) and Washington-Douglas (which has been an all Negro school) are under capacity. The boundary between these unitary zones as approved by the Court places Negro

pupils who live much closer to Parkview in the zone of Washington-Douglas. And while the proof shows that there is considerable new development in the eastern part of the Parkview zone, there is nothing to show that Parkview would be over capacity if its zone is extended westwardly to include these Negro pupils. We conclude that the zone of Parkview should be extended westwardly to include the area bounded by Chester on the south, Royal on the west and College on the north.

The most recent figures show that both Alexander (which has been a predominantly white school but has had 87 Negro pupils) and Lincoln (which has been an all Negro school) are under capacity. The boundary between these unitary zones as approved by the Court follows the I.C.R.R. and G. M. & O. R.R. tracks southwesterly until it reaches Alice and then leaves these tracks and runs west on Alice to Royal and south on Royal to Preston. This means that there are Negro pupils who live much closer to Alexander but who must cross the railroad tracks to Lincoln. It is true that Lincoln has been somewhat more under capacity than Alexander. However, if it should become necessary, defendants could make an adjustment in the bounary between the Alexander zone and the Highland Park zone, the latter school also being under capacity. We conclude that the portion of the Lincoln zone bounded by the railroad tracks on the east, Alice on the north, Royal on the west and Preston on the south should be included in the Alexander zone.

There are three junior high schools in Jackson. Tigrett and Jackson have been all white schools and Merry has been all Negro. Tigrett is located in the western section, Merry is located in the central section and Jackson is located in the eastern section. The zones proposed by the defendants would, generally, allocate the western section

to Tigrett, the central section to Merry, and the eastern section to Jackson. The boundaries follow major streets or highways and railroads. According to the school population maps, there are a considerable number of Negro pupils in the southern part of the Tigrett zone, a considerable number of white pupils in the middle and northern parts of the Merry zone, and a considerable number of Negro pupils in the southern part of the Jackson zone. The location of the three schools in an approximate east-west line makes it inevitable that the three zones divide the city in three parts from north to south. While it appears that proximity of pupils and natural boundaries are not as important in zoning for junior highs as in zoning for elementary schools, it does not appear that Negro pupils will be discriminated against. The only real alternative offered by plaintiffs is to adopt a "feeder" syste mwhereby certain elementary schools would "feed" pupils to a particular junior high, but there is no constitutional requirement that this particular system be adopted. We conclude that the proposed junior high school zones proposed by defendants do not amount to unconstitutional gerrymandering.

Under the plan for gradual desegregation approved by the Court in the summer of 1963, the first three grades were desegregated in the school year 1963-4, the next three grades i n1964-5, and thereafter two additional grades are to be desegregated each succeeding year. Under this plan, the 7th and 8th grades only would be desegregated in the coming year, 1965-6. Plaintiffs moved the Court to amend the plan to require all remaining grades be desegregated in 1965-6, and the Court has allowed them to reopen this question. They contend that "all deliberate speed" requires this action.

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Memorandum Decision

In view of the undisputed proof that no substantial administrative problems have so far been met, we conclude plaintiffs are entitled to some acceleration in the plan. More particularly, we conclude that all of the junior high grades (7th, 8th and 9th) should be desegregated in the year 1965-6; and we further conclude that all of the senior high grades (10th, 11th and 12th) should be desegregated in 1966-7.

Plaintiffs also moved the Court to order desegregation of teachers, and the administrative and supporting personnel. At an earlier stage of this proceeding, we held that plaintiffs are entitled to assert a claim for desegregation of teachers and principals, but that they are not entitled to assert a claim for desegregation of other personnel. We took under advisement the claim with respect to teachers and principals pending implementation of the plan, and we ordered struck from the complaint he claim with respect to other personnel. (221 F. Supp. 968, 972) This determination was made on the basis of the clear holding to that effect by our Court of Appeals in *Mapp* v. *Board of Education of Chattanooga,* 319 F.2d 571, 576 (6th Cir. 1963). Accordingly, we have for consideration only the claim for desegregation of teachers and principals.

We first must ascertain the guidelines for determining whether plaintiffs are entitled to desegregation of faculty and principals. We must do this from a very limited number of cases which deal with the problem. As stated; our Court of Appeals held that plaintiffs in such a case as this are entitled to press this claim as part of their claim "to an education free of any consideration of race." It also held that they have no right to assert any constitutional claims the teachers and principals may have. (*Mapp,*

supra.) However, the Court was not specific, saying in part (319 F.2d 571, 576):

> "We agree that the teachers, principals and others are not within the class represented by plaintiffs and that plaintiffs cannot assert or ask protection of some constitutional rights of the teachers and others, not parties to the cause. We, however, read the attack upon the assignment of teachers by race not as seeking to protect rights of such teachers, but as a claim that continued assigning of teaching personnel on a racial basis impairs the students' rights to an education free from any consideration of race.
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> "... [W]e think it appropriate that the stricken allegations of the complaint, insofar as they relate to the assignment of teachers and principals, be restored to the pleading and that decision of the legal question presented await developments in the progress of the plan approved. Nothing we have said need call for any present taking of testimony on the subject of teacher and principal assignement. Within his discretion, the District Judge may determine when, if at all, it becomes necessary to give consideration to the question under discussion. We affirm, however, the order granting the motion to strike, to the extent that it applies to allegations relating to the hiring and assignment of school personnel other than teachers and principals."

In *Augustus* v. *Board of Public Instruction of Escambia County, Florida,* 306 F.2d 862 (5th Cir. 1962) the Court held, as *Mapp* later held, that it was improper to strike this

claim for relief before the trial on the merits and indicated that at such hearing relief could be granted. In *Board of Public Instruction of Duval County, Florida* v. *Braxton,* 324 F.2d 616 (5th Cir. 1964) the Court held (one judge dissenting) that the trial court was within its proper discretion in ordering a desegregation of faculty in a decree providing for desegregation of pupils. In *Bradley* v. *School Board of Richmond, Virginia,* 345 F.2d 310 (4th Cir. 1965) the Court held that the trial court was within its discretion in denying an application for desegregation of teachers. It pointed out that this issue had been ignored at the trial, and said that the granting of such relief should depend upon a balancing of the need therefor to protect the constitutional rights of the pupils against the effect it would have on the administration of the schools and the efficiency of the staffs. Two judges, dissenting on this question, said at p. 324:

> "The composition of the faculty as well as the composition of its student body determines the character of a school. Indeed, as long as there is a strict separation of the races in faculties, schools will remain 'white' and 'Negro,' making student desegregation more difficult. The standing of the plaintiffs to raise the issue of faculty desegregation is conceded. The question of faculty desegregation was squarely raised in the District Court and should be heard. It should not remain in limbo indefinitely. After a hearing there is a limited discretion as to when and how to enforce the plaintiffs' rights in respect to this, as there is in respect to other issues, since administrative considerations are involved; but the matter should be inquired into promptly. There is no legal reason

why desegregation of faculties and student bodies may not proceed simultaneously."

In one District Court case in Tennessee, *Sloan* v. *Tenth School District of Wilson County, Tennessee,* 9 Race Rel. L. Rep. 1306 (M.D. Tenn. 1964), the Court ordered desegregation of faculties, and we understand that this has been done by consent order in several other cases involving school districts of this state.

We gleam from the foregoing cases that this application for desegregation of faculties and principals largely addresses itself to the discretion of the trial court and that in exercising its discretion the Court should consider the current need for this action in effecting abolition of compulsory segregation of pupils as against any problems involved in taking this step.

The defendants contend that there is no current need to desegregate the faculties and principals and that the teachers might be seriously adverse to such action. Plaintiffs offered some testimony from Negro parents that Negro pupils are reluctant to attend schools in which all of the teachers are white, some because they are afraid that the white teachers would require higher performance and perhaps others because they are afraid that they would not receive fair treatment. These witnesses gave no specific examples. It should be noted, however, that the intervening plaintiffs, at least, are seeking to attend schools with all white faculties. Plaintiffs' education experts largely testified in terms of the educational desirability of mixed faculties, but we do not believe that this is a constitutional consideration. Plaintiffs' sociology expert testified that in his investigation of the question at Nashville he had not turned up much evidence that fear of going to school to

all white teachers is a deterrent, but he also testified that having all Negro teachers stigmatizes a school as a "Negro" school which tends to keep it segregated.

We do not believe that the proof of the plaintiffs is sufficiently strong to entitle them at this time to an order requiring integregation of the faculties and principals. At the same time we do not believe that they are, on this proof, entitled to some relief, and this Court in its discretion may fashion the remedy which it believes to be consistent with the need shown. It is obvious that the defendants have followed a policy of assigning white teachers, simply because of their race, only to schools in which the pupils are all or predominantly white, and of assigning Negro teachers, simply because of their race, only to schools in which the pupils are all Negroes. We believe that this policy should be rescinded, and that a white teacher should not be prohibited, because of his or her race, from teaching in a school in which the pupils are all or predominantly Negro, and that a Negro teacher should not be prohibited, because of his or her race, from teaching in a school in which the pupils are all or predominantly white. This would mean that white and Negro teachers, who so desire, would not be barred, because of their race, from teaching pupils all or a majority of whom were of the other race. But it also would mean that none would be forced to do so and would mean that, of course, all other usual factors could be considered in determining the assignment of teachers.

Plaintiffs next contend that they are entitled to an order prohibiting all segregation in curricular and extra-curricular activities of desegregated grades. As to curricular activities, we were under the impression that such a provision had been included in the decree heretofore entered,

but for some reason it was omitted. In any event, plaintiffs are entitled to an order providing that, with respect to desegregated grades, segregation is prohibited as to all school facilities, and as to all curricular activities, including athletics.

The question regarding extra-curricular activities is more difficult. Certainly, as to school-sponsored activities, there must be no discrimination based on race by the defendants, and plaintiffs are entitled to an order to that effect. However, we must deal in particular with an incident which has occurred which plaintiffs contend amounted to discrimination in a school-sponsored activity. It seems that the private organization which operates the Jackson Symphony Orchestra invited the pupils in certain grades in those elementary schools in which the pupils are all or predominantly white to attend a concert during school hours. The pupils in the same grades in elementary schools in which the pupils are all Negroes were not invited. Defendants accepted this invitation, and the invited pupils, including those Negro pupils who were in those grades, attended the concert. The proof showed without question that defendants were not motivated by racial considerations in accepting this invitation. We believe that this occurrence does not constitute unconstitutional discrimination. On the contrary, we believe that defendants may in their discretion allow pupils to attend an outside activity, whether it be a concert, a speaker or whatever, so long as defendants are not motivated by racial considerations.

Plaintiffs also seek an order prohibiting segregation of teacher in-service training. Although the proof is not completely clear, it appears that the only such segregation that remains results from the fact that the white teachers and

the Negro teachers are members of separate professional organizations. It appears without dispute that defendants do not control the policies of these organizations. In any event, as heretofore indicated, the *Mapp* case, *supra*, holds that plaintiffs have no standing to assert any constitutional claims that the teachers may have and may assert a claim for teacher desegregation only in support of their constitutional right, as pupils, to an abolition of discrimination based on race. The assertion by plaintiffs that what remains of segregation in teacher in-service training has an effect on their right as pupils is, on the proof in this case, extremely tenuous. We deny this application for relief.

Plaintiffs last contend that defendants should be required to pay their attorneys' fees and to pay expenses incurred by plaintiffs in the employment of certain expert witnesses.

With respect to attorneys' fees, it is incumbent on plaintiffs first to prove a legal liability on their part to pay such fees, that is, plaintiffs must prove an express or implied contract to pay either a fee specific in amount or a reasonable fee. 20 C.J.S., Costs, Sec. 218, p. 453 et seq. The proof here shows that when some of intervening plaintiffs were denied the opportunity to attend the schools to which they had applied, they called on these attorneys to represent them. The attorneys, after interviewing these plaintiffs, forthwith filed the first motion for additional relief and thereafter handled this litigation. While there was some proof that the attorneys might be able to look elsewhere for payment in the event intervening plaintiffs did not pay them, there was certainly an implied contract between these plaintiffs and the attorneys that a reasonable fee would be paid by them.

Memorandum Decision

In *Bell* v. *School Board of Powhatan County, Virginia,* 321 F.2d 494, 500 (4th Cir. 1963), a school desegregation case, the court held that the trial court had abused its discretion in refusing to allow plaintiffs to recover attorneys' fees. In that case the school authorities had been guilty of ". . . a long continued pattern of evasion and obstruction. . . ." In a later school segregation case, the Fourth Circuit affirmed the trial court in its denial of attorneys' fees, but recognized that a fee should be allowed ". . . when it is found that the bringing of an action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy." *Bradley* v. *School Board of the City of Richmond,* 345 F.2d 310 (4th Cir. 1965).

In this case during the summer of 1964 when intervening plaintiffs applied to attend schools outside of their zones, defendants were, as a matter of course, allowing both white and Negro pupils to do so if they would be in a racial majority. It appears that the applications of plaintiffs were denied by the superintendent because they would be in a minority in the schools they sought to attend. The action by the superintendent in denying their applications was in clear violation of the decree of this court, and it was in clear violation of the constitutional rights of these plaintiffs as had been expressly held by the Supreme Court in *Goss, et al.* v. *Board of Education of the City Knoxville,* 373 U.S. 683 (1963), all of which defendants must have, or certainly should have, known. For this reason, plaintiffs are entitled to recover an attorneys' fee for their handling of this aspect of the litigation. It is no answer to say that these plaintiffs did not seek redress from the action of the superintendent by appealing to the defend-

ant Board members. Defendants do not even contend that the superintendent was not acting with authority; it appears that he was following an adopted plan or policy. Moreover, the proof shows that plaintiffs were not advised that their applications had been denied until the Saturday before the Monday that the school session was to begin.

On the other hand, with respect to the other issues presented by these motions for additional relief, it does not appear that defendants have violated any order of this court or have in any wise acted improperly. We therefore award plaintiffs and attorneys fee of $1,000.00 as costs in this cause.

As stated, plaintiffs also seek to recover as costs the fees and expenses of their expert witnesses. However, these experts did not testify on any issue as to which this court has found defendants in violation of its decree or as to any issue as to which the court has found that defendants have acted in disregard of the constitutional rights of these plaintiffs. Moreover, these experts in large measure gave educational or sociological opinions of no particular constitutional relevance. We therefore deny this application.

In closing this opinion, this court would like to point out that there appears to be little communication between the school authorities and the interested Negro leadership in the community. There certainly should be. As desegregation progresses under this plan, there are bound to be points of difference between the Negro citizens and the school authorities as to rights of the Negroes and the obligations of the authorities. These differences should first be the subject of a conference in an effort to compose them amicably. They should be brought to court only when

the differences cannot so be resolved and are of substantial significance.

An order will be prepared for entry by the parties consistent with the rulings in this opinion.

ENTER this 30th day of July, 1965.

/s/ BAILEY BROWN
United States District Judge

A TRUE COPY.

ATTEST:

W. LLOYD JOHNSON, Clerk.

By A. H. SAWYER, DC

Order of the United States District Court for the Western District of Tennessee

(filed August 11, 1965)

[Caption Omitted]

This cause came on before the Honorable Bailey Brown, District Judge, at a pre-trial conference held May 26, 1965 in the Court's Chambers, whereupon the Court did, upon the statement of facts by defendants' counsel to the Court, declare and decide that the manner of application by the defendants of the transfer provisions is unconstitutional unless the defendants allow a transfer of a student from a school in which said student be in the racial majority to a school, outside of his zone, in which such student would be in a racial minority on the same basis that transfers were allowed to a student from a school in which such student is in the racial minority to a school, outside his zone, in which said student would be in a racial majority. The Court further did find and determine that the remaining issues to be heard by the Court at a later hearing would be as follows:

1. Whether or not the elementary school unitary zones previously approved by the Court, as subsequently amended by defendants, amounted to unconstitutional gerrymandering.

2. Whether or not the junior high school unitary zones proposed by defendants amounted to unconstitutional gerrymandering.

3. Whether or not the Court should order a desegregation of faculty and administrative and supporting personnel, including faculty in-service training, in the City Schools of Jackson.

Order

4. Whether or not the Court should order an acceleration of the plan of desegregation heretofore approved by the Court.

5. Whether or not the defendants had discriminated against the plaintiffs in extra-curricular activities.

6. Whether or not plaintiffs should be awarded an attorneys' fee in this proceeding.

This cause thereupon came on to be heard on the 18th day of June, 1965, and upon a former day of the term, before the Honorable Bailey Brown, District Judge, sitting without intervention of a jury, upon the Motion for Further Relief and to add parties as additional and/or intervening plaintiffs, filed by the plaintiffs on 4 September 1964 against the defendants, Board of Commissioners of the City of Jackson, Tennessee, its board members and C. J. Huckaba, Superintendent of City Schools, a replication filed by said defendants to said motion on or about 11 September 1964, the pretrial order entered by the Court on 28 September 1964 allowing the intervention of additional parties plaintiff and granting and denying certain other preliminary relief having to do with preparation for trial of said motion, the supplemental replication to said motion of September 4, 1964 filed by said defendants on or about 12 November 1964, a petition filed by said defendants on or about 13 November 1964 seeking approval of proposed junior high school unitary zones filed concurrently therewith and also seeking consolidation of the hearing on said petition with the hearing upon plaintiffs' said motion for further relief, plaintiffs' specifications of objections to said junior high school unitary zones filed by defendants and their agreement to consolidation of said hearings, the additional mo-

tion for further relief against said defendants filed by the plaintiffs on or about 19 April 1965, the replication of said defendants to said additional motion for further relief of the plaintiffs, filed on or about 18 May 1965, and the exhibits filed by the respective parties to the foregoing pleadings, the evidence introduced by the parties in open court, arguments of counsel and the entire record upon the issues prescribed by the Court at the May 26, 1965 pre-trial conference, from all of which the Court finds and holds that the plaintiffs are entitled to certain relief upon some of the issues, but that the relief sought by plaintiffs should be denied on other issues, as hereinafter provided, and as more fully stated in the Memorandum Decision filed by the Court on 30 July 1965, which is hereby made a part of the record and is adopted as the Findings of Fact and the Conclusions of Law made by the Court upon the various pleadings set forth hereinabove.

IT IS, THEREFORE, ORDERED, ADJUDGED, DECREED AND ENJOINED by the Court as follows:

1. The assignment and transfer plan or policy in the City of Jackson, Tennessee school system as actually carried out by said defendants deprives plaintiffs of their constitutional rights, and must be amended in the following particulars:

(a) If said defendants continue their policy of allowing white and Negro pupils, as a matter of course, to attend schools outside of their unitary zones where they will be in a racial majority, they must, beginning with the 1965-66 school year, also allow white and Negro pupils to the same extent and under the same terms to attend schools, as a matter of course, outside of their unitary zones where they will be in a racial minority. In addition, those Negro pupils

who have heretofore applied for and been denied the right to attend predominantly white schools outside their unitary zones must be admitted to such schools, at least in the school year 1965-66, if they so desire.

(b) In allowing pupils to attend schools outside their unitary zones irrespective of whether they will be in a racial majority or minority, each pupil must be required each year to register in the school of his unitary zone and apply for a transfer, and shall not be permitted to register directly in the school or schools outside of his or her zone.

(c) All pupils who were not in the school system in 1962-63 shall not have the right, as do pupils who were attending during that year, to continue until graduation in a school outside their zone. All such pupils shall be required each year to register in the school of their respective unitary zones and apply for any transfer, if desired.

2. The unitary zones established by defendants and heretofore approved by this Court for the elementary schools of the City of Jackson, as subsequently amended by defendants, in some areas appear to be gerrymandered and will therefore be revised by defendants in the following particulars:

(a) The south line of the West Jackson School zone shall extend eastwardly from Poplar along Main to Royal.

(b) The zone of Parkview School shall be extended westwardly to include the area bounded by Chester on the south, Royal on the west and College on the north.

(c) That portion of the Lincoln School zone bounded by the railroad tracks on the east, Alice on the north, Royal on the west and Preston on the south shall be included in the Alexander School Zone.

3. The proposed junior high school zones proposed by defendants do not amount to unconstitutional gerrymandering and are approved by the Court.

4. Desegregation in the City of Jackson School System will be accelerated as follows: All of the junior high grades (7th, 8th and 9th) shall be desegregated at the beginning of the school year 1965-66; and all of the senior high grades (10th, 11th and 12th) shall be desegregated at the beginning of the school year 1966-67 so that said school system shall be totally desegregated at the beginning of said latter year.

5. The application of plaintiffs for an order requiring integration of faculty is at this time denied. However, the policy of defendants of assigning white teachers only to schools in which the pupils are all or predominantly white and Negro teachers only to schools in which the pupils are all Negro is by this order rescinded to the extent that white teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly Negro, and Negro teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly white.

To implement this change in policy, defendants must forthwith, as to substitute teachers, and each year beginning with the year 1966-67, as to all teachers, publicize it and obtain from each teacher an indication of willingness or an indication of objection to teaching in a school in which the pupils are all or predominantly of the other race. All teachers who indicate such a willingness will be assigned to schools without consideration of the race of the teacher or the pupils, but all other usual factors may be considered in assigning teachers. Nothing in this order, however, will

be construed as requiring the assignment of an objecting teacher to a school in which the pupils are all or predominantly of the other race or will be construed as requiring a refusal to employ or a dismissal of a teacher who objects to teaching in such a school. This change in policy will be effective as to substitute teachers during the remainder of the school year 1965-66 and as to all teachers beginning with the school year 1966-67.

6. The Court finds that its previous Judgment entered in this cause failed to include an order requiring defendants to eliminate all racial discrimination and segregation in curricular and school sponsored extra-curricular activities in the City of Jackson School System and the Court so orders. However, the Court has not found the defendants guilty of any unconstitutional discrimination in connection herewith.

7. The application of plaintiffs for an order requiring desegregation of administrative and supporting personnel is denied.

8. As to teacher in-service training and professional activities, plaintiffs are denied relief.

9. Plaintiffs are entitled to recover an attorneys' fee for the handling of that aspect of the litigation pertaining to the application of the intervening plaintiffs in the summer of 1964 to transfer to schools outside of their zones and the defendants' denial of said application in clear violation of the constitutional rights of these plaintiffs. In this connection, the Court finds that these services consisted of interviewing of plaintiffs at Jackson on the day before school

was to begin, preparation and filing of motion, attendance by the attorneys at two pre-trial conferences at Memphis, and preparation of order for entry, and that, therefore, a fee of $1,000.00 for said attorneys would be fair and reasonable and is awarded as costs in this action.

10. The application of plaintiffs to recover as costs the fees and expenses of their expert witnesses is denied.

11. Jurisdiction of the case is retained by the Court pending full implementation of desegregation in the City School System of Jackson, Tennessee, and either party may apply.

ENTER this 11th day of August, 1965.

BAILEY BROWN
United States District Judge

A TRUE COPY.

ATTEST:

W. LLOYD JOHNSON, Clerk.

By A. H. SAWYER, DC

Opinion of the United States Court of Appeals For the Sixth Circuit

Nos. 17,118 and 17,119

BRENDA K. MONROE, *et al.*,

Plaintiffs-Appellants,

v.

BOARD OF COMMISSIONERS, CITY OF JACKSON, TENNESSEE, *et al.*, and COUNTY BOARD OF EDUCATION, MADISON COUNTY, TENNESSEE, *et al.*,

Defendants-Appellees.

APPEAL FROM THE U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Decided July 21, 1967

Before: O'SULLIVAN, PHILLIPS and PECK, Circuit Judges.

O'SULLIVAN, Circuit Judge. In 1963 a suit was filed by Brenda K. Monroe and others, Negro children and their parents, to bring about the desegregation of the public schools of the City of Jackson, and of Madison County, Tennessee.[1]

The District Court required the school authorities to submit plans to accomplish desegregation and ultimately granted the relief sought by approving parts of a submitted plan and ordering other steps to be taken. Separate opin-

[1] The City of Jackson is located in Madison County and the respective school authorities are the Board of Commissioners of the City of Jackson and the County Board of Education of Madison County.

ions were written, one involving the City of Jackson schools, reported as *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee, et al.*, 221 F. Supp. 968 (W.D. Tenn. E.D. 1963) and the other relating to Madison County schools, reported in *Monroe* v. *Board of Commissioners, etc., et al.*, 229 F. Supp. 580 (W.D. Tenn. E.D. 1964). Appeals to this Court from these cases were dismissed by agreement. Obedient to the above decisions, all grades of the schools involved have been desegregated.

The litigation with which we now deal arises from Motions for Further Relief filed in the District Court by plaintiffs. By these motions, plaintiffs sought to accomplish greater integration of the school children, desegregation of the teaching staffs, and the enjoining of described practices of the school authorities which were alleged to be violative of the District Judge's original decrees and contrary to new developments in the law. The District Judge, again, dealt separately with the city and the county schools in disposing of the Motions for Further Relief. His decision as to the city schools is reported in *Monroe* v. *Board of Commissioners, City of Jackson,* 244 F. Supp. 353 (W.D. Tenn. E.D. July 30, 1965) and as to the County Schools in *Monroe* v. *Board of Education, Madison County, Tennessee, et al.*, —— F. Supp. —— (W.D. Tenn. E.D. August 2, 1965). These are the cases before us on this appeal; the plaintiffs are the appellants. These opinions, with the earlier ones reported at 221 F. Supp. 968 and 229 F. Supp. 580, *supra,* set out the facts and we will restate them only where needed to discuss the present contentions of the plaintiffs-appellants.

Opinion of the United States Court of Appeals For the Sixth Circuit

1) *Compulsory integration.*

Appellants argue that the courts must now, by reconsidering the implications of the *Brown* v. *Board of Education* decisions in 347 U.S. 483 (1954) and 349 U.S. 294 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance in their schools which is the product of the residential pattern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion. We have so recently expressed our like view in *Tina Deal, et al.* v. *The Cincinnati Board of Education,* 369 F(2) 55 (CA 6, 1966), petition for cert. filed, 35 LW 3394 (U.S. May 5, 1967) (No. 1358), that we will not here repeat Chief Judge Weick's careful exposition of the relevant law of this and other circuits. He concluded "We read *Brown* as prohibiting only enforced segregation." 369 F(2) at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before *Brown,* whereas we consider here Tennessee schools desegregated only after and in obedience to *Brown.* We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to *Brown,* maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation—this to

be true even though the current problem be the same in each state.

We are asked to follow *United States* v. *Jefferson County Board of Education*, 372 F(2) 836 (CA 5, 1966), which seems to hold that the pre-*Brown* biracial states must obey a different rule than those which desegregated earlier or never did segregate. This decision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished *Bell* v. *School City of Gary, Indiana*, 324 F(2) 209 (CA 7, 1963), *cert. den.* 377 U.S. 924, on the ground that no pre-*Brown* de jure segregation had existed in the City of Gary, Indiana. 372 F(2) at 873. It would probably find like distinction in our *Tina Deal* decision because of *Cincinnati's* long ago desegregation of its schools. We, however, have applied the rule of *Tina Deal* to the schools of Tennessee. In *Mapp* v. *Board of Education*, 373 F(2) 75, 78 (CA 6, 1967) Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in *Deal* v. *Cincinnati Board of Education*, 369 F(2) 55 (6th Cir. 1966)."

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson, supra*, concedes, de jure and were once found lawful in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would be in the

nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U.S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

This is not to say that Tennessee school authorities can dishonestly construct or deliberately contrive a system for the purpose of perpetuating a "maximum amount" of its pre-*Brown* segregation. *Northcross* v. *Board of Education of City of Memphis*, 33 F(2) 661, 664 (CA 6, 1964). But to the extent that *United States* v. *Jefferson County Board of Education,* and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in *Deal*, we respectfully decline to follow them.

2) *Gerrymandering.*

Appellants assert that while giving surface obedience to the establishment of a unitary zoning system and freedom of choice, the school officials of the City of Jackson had been guilty of "gerrymandering" in order "to preserve a maximum amount of segregation." Were this true, it would be violative of the law. *Northcross* v. *Board of Education of City of Memphis*, 302 F(2) 818, 823, (CA 6, 1962), *cert. den.* 370 U.S. 944, and *Northcross* v. *Board of Education of City of Memphis*, 333 F(2) 661, 664 (CA 6, 1964). The District Judge in the instant matter did hold that as to some boundary lines "there appears to be gerrymandering." *Monroe* v. *Board of Commissioners, City of Jackson, supra,* 244 F. Supp. at 361. As to these instances, he ordered changes in the school zone lines. *Id.* at 361, 362. But, as to the junior high schools, he concluded,

> "that the proposed junior high school zones proposed by defendants do not amount to gerrymandering." 244 F. Supp. at 362.

Without making our own recitation of the relevant evidence, we express our agreement with the District Judge.

3) ***Faculty desegregation.***

In the accomplishment of desegregation in the involved schools, there remain some that are attended only by Negro and others only by white children. The teaching staff conforms substantially to this pattern—all Negro teachers in the all Negro schools and all white teachers in the all white schools. Little attention was paid to the teaching staff in the early desegregation cases. *Brown* v. *Board of Education, supra*, did not speak on it, nor did the early relevant decisions from this circuit. In *Mapp* v. *Board of Education of Chattanooga*, 319 F(2) 571, 576 (CA 6, 1963), however, we ordered restored to the complaint there involved allegations and prayers for relief relating to assignment of teachers and principals, but ordered also that "decision of the legal question presented await development of the progress of the plan approved." 319 F(2) at 576. And we further concluded that "within his discretion, the District Judge may determine when, if at all, it becomes necessary to give consideration to the question. . . ." *Ibid.*

This leisurely postponement of consideration of faculty desegregation appealed to the Fourth Circuit, when in *Bradley* v. *School Board of City of Richmond, Virginia*, 345 F(2) 310, 320, 321 (CA 4, 1965), it said:

> "The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need

not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools. An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils."

But the Supreme Court declared this would not do, and in *Bradley* v. *School Board,* 382 U.S. 103 (1965), remanded the case to require the Richmond School Board to proceed with study and resolution of the faculty integration question, stating,

"There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegration plans is entirely speculative." 382 U.S. at 105.

The *Bradley* opinion was followed by *Rogers* v. *Paul, et al,* 382 U.S. 198 (1965); once again the Supreme Court remanded the cause for consideration of the faculty desegregation problem.

The District Judge in the matter now before us did hear some evidence on the question of faculty desegregation and concluded,

"We do not believe that the proof of the plaintiffs is sufficiently strong to entitle them to an order requiring

integration of the faculties and principals." 233 F. Supp. at 364.

He did, however, attack a then current policy of the school authorities whereby white teachers and Negro teachers, "simply because of their race," were respectively assigned only to schools whose pupils were all or predominantly of that teacher's race. The order implementing his decision contained the following:

> "The application of plaintiffs for an order requiring integration of faculty is at this time denied. However, the policy of defendants of assigning white teachers only to schools in which the pupils are all or predominantly white and Negro teachers only to schools in which the pupils are all Negro is by this order rescinded to the extent that white teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly Negro, and Negro teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly white.
>
> To implement this change in policy, defendants must forthwith, as to substitute teachers, and each year beginning with the year 1966-67, as to all teachers, publicize it and obtain from each teacher an indication of willingness or an indication of objection to teaching in a school in which the pupils are all or predominantly of the other race. All teachers who indicate such a willingness will be assigned to schools without consideration of the race of the teacher or the pupils, but all other usual factors may be considered in assigning

teachers. Nothing in this order, however, will be construed as requiring the assignment of an objecting teacher to a school in which the pupils are all or predominantly of the other race or will be construed as requiring a refusal to employ or a dismissal of a teacher who objects to teaching in such a school. This change in policy will be effective as to substitute teachers during the remainder of the school year 1965-66 and as to all teachers beginning with the school year 1966-67."

We note that this order was handed down before *Bradley* v. *School Bd., supra,* and we are constrained to hold that it does not commit or require the school authorities to adopt an adequate program of faculty desegregation which will pass muster under the implied command of the *Bradley* case. Whatever *Bradley's* clear language, we cannot read it otherwise than as forbidding laissez faire handling of faculty desegregation. It implies that the accomplishment of that goal cannot be left to the free choice of the teachers and that the Board must exercise its authority in making faculty assignments so as to assist in bringing to fruition the predicted benefits of school desegregation.

No Supreme Court decision, however, has as yet provided a blue print that will achieve faculty desegregation. The United States Office of Education has indicated that, in some affirmative way, school boards must act to correct past discriminatory practices in the assignment of teachers.[2] But its recommendations do not have the force of

[2] "§181.13 Faculty and Staff

(a) *Desegregation of Staff.* The racial composition of the professional staff of a school system, and of the schools in the system, must be considered in determining whether students are subjected to discrimination in educational programs. Each school system is responsible for correcting

law; neither does it provide clear guidelines to make easy the job of school boards in dealing with this problem. It will be difficult to eliminate the forcing of people into places and positions because of race and at the same time compulsorily assign a school teacher on the basis of his or her race.

It is sufficient for us to say now that the formula announced by the District Judge, leaving the decision of integration of the faculties to the voluntary choice of the

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the effects of all past discriminatory practices in the assignment of teachers and other professional staff.

(b) *New assignments.* Race, color, or national origin may not be a factor in the hiring or assignment to schools or within schools of teachers and other professional staff, including student teachers and staff serving two or more schools, except to correct the effects of past discriminatory assignments.

• • •

(d) *Past assignments.* The pattern of assignment of teachers and other professional staff among the various schools of a system may not be such that schools are identifiable as intended for students of a particular race, color, or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority, of the students are of that race. Each school system has a positive duty to make staff assignments and reassignments necessary to eliminate past discriminatory assignment patterns. Staff desegregation for the 1966-67 school year must include significant progress beyond what was accomplished for the 1965-66 school year in the desegregation of teachers assigned to schools on a regular full-time basis. Patterns of staff assignment to initiate staff desegregation might include, for example: (1) Some desegregation of professional staff in each school in the system, (2) the assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority and where special staff training programs are established to help with the process of staff desegregation, (3) the assignment of a significant portion of the staff on a desegregated basis to those schools in which the student body is desegregated, (4) the reassignment of the staff of schools being closed to other schools in the system where their race is a minority, or (5) an alternative pattern of assignment which will make comparable progress in bringing about staff desegregation successfully."

teachers, does not obey current judicial commands. We, therefore, remand this phase of the litigation to the District Judge to reconsider upon a further evidentiary hearing the matter of faculty desegregation.

4) ***Desegregation of Teachers Organizations.***

It appears that at the time of the hearing in the District Court there existed in Tennessee two voluntary organizations, the Tennessee Education Association, whose membership was confined to white teachers, and the Tennessee Education Congress, made up of Negro teachers. Traditionally, the School Board allowed separate holidays to permit the members of these organizations to attend so-called "teacher in-training" programs. The District Judge dealt with this subject as follows:

> "Plaintiffs also seek an order prohibiting segregation of teacher in-service training. Although the proof is not completely clear, it appears that the only such segregation that remains results from the fact that the white teachers and the Negro teachers are members of separate professional organizations. It appears without dispute that defendants do not control the policies of these organizations. In any event, as heretofore indicated, the Mapp case, supra, holds that plaintiffs have no standing to assert any constitutional claims that the teachers may have and may assert a claim for teacher desegregation only in support of their constitutional right, as pupils, to an abolition of discrimination based on race. The assertion by plaintiffs that what remains of segregation in teacher in-service training has an effect on their right as pupils is, on the proof in this

case extremely tenuous. We deny this application for relief." 244 F. Supp. at 365.

The evidence on this subject is too meager to permit us to evaluate the extent to which the school authorities participated in or aided the activities of these separate teacher organizations, and the degree to which membership by the teachers in them would, in turn, affect the rights of the pupils. It appears, however, that these in-service training programs for teachers are conducted pursuant to state law, and are financed with public funds.[1] We make clear that the plaintiff pupils do have standing to assert that the existence of separate teacher organizations based on race and the school authorities' cooperation with their separated activities such as the in-training program "impairs the students' rights to an education free from any consideration of race." *Mapp* v. *Board, supra,* 319 F(2) at 576. If the District Judge's above quoted language can be read as a contrary holding, it is error. We also remand this issue to the District Judge for further consideration.

5) *The Jackson Symphony Orchestra.*

It appeared that the Jackson Symphony Association, with permission of the school authorities, arranged for a program by the Jackson Symphony Orchestra at one of the Jackson schools. The ladies in charge of this event invited the children in several grades of the Jackson City Schools, the County schools, and the Catholic schools. Those students included some from the all-white schools, and some from the schools, public and parochial, containing both

[1] See e.g., Chap. 76 Tenn. Public Acts, 1965, Sec. 24.

Negro and white students. Students in all-Negro schools were not invited for the two performances involved. Testimony by one of the ladies of the Symphony Association denied any discriminatory motivation in the selection of the pupils, suggesting that the capacity of the auditorium was exhausted by those invited and in attendance. She said,

> "If we had room, we would have had every child in town there—fourth, fifth and sixth grades of every school, but we didn't have room."

The school authorities had nothing to do with the matter of who was to be chosen to attend the concert. Its only participation was to allow the use of the auditorium. While it would be impermissible for school authorities to allow use of school facilities for entertainment that was discriminatory, nothing was developed by the evidence to cause us to criticize the District Judge's conclusion that the "defendants were not motivated by racial considerations" in their handling of this matter. *Monroe* v. *Board of Commissioners, supra,* 244 F. Supp. at 365.

Another issue discussed by the District Judge, —— F. Supp. at ——, the so-called "split season," has been rendered moot by the elimination of the practice.

The cause is remanded to the District Judge for further consideration of the matter of faculty desegregation and teacher in-service training, and is otherwise affirmed.

Judgment of the United States Court of Appeals for the Sixth Circuit

(filed July 21, 1967)

No. 17,118

BRENDA KAY MONROE, *et al.*,

Plaintiffs-Appellants,

—vs.—

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, ITS BOARD MEMBERS, and C. J. HUCKABA, SUPERINTENDENT OF CITY SCHOOLS,

Defendants-Appellees.

Before:

O'SULLIVAN, PHILLIPS and PECK,

Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that this cause be and the same is hereby remanded to the District Judge for further consideration of the matter of faculty desegregation and teacher in-service training, and is otherwise affirmed.

No costs on appeal awarded either party.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

A True Copy.